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No. 87-283

In The
Supreme Court of the United States
October Term, 1987

JOSEPH G. BUDINICH,
Petitioner,

v.

BECTON DICKINSON AND COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the time in which to appeal a judgment of the federal district court is governed by federal law and procedure?

2. Whether an appeal from a final judgment on the merits of an action is untimely when it is not filed within the time set by the Federal Rules of Appellate Procedure, where an order taxing attorneys' fees as costs of the action is pending?

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No. 87-283

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JOSEPH G. BUDINICH,
Petitioner,

v.

BECTON DICKINSON AND COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

Respondent, Becton Dickinson and Company,[1] respectfully requests that this Court affirm the decision of the Court of Appeals for the Tenth Circuit.

[1]Becton Dickinson and Company is a publicly owned corporation. It has no subsidiaries other than wholly-owned subsidiaries. Becton Dickinson and Company has equity investments in the following companies: Applied Bio Systems, Inc.; Oncongene Science, Inc.; Quidel; Cell Analysis Systems, Inc.; and Alyx, Inc.

STATEMENT OF THE CASE

The issue before the Court is whether petitioner filed a timely notice of appeal from the judgment below. The case arose out of a dispute over the amount of commissions owed petitioner on sales made by respondent while petitioner served as respondent's western regional manager. In 1979, two years prior to the sales at issue, respondent had modified its commission structure applicable to employees at petitioner's level. Although petitioner initially protested this change in the commission structure, he continued employment with respondent. Petitioner was terminated from his position in November, 1981.

In February, 1982, petitioner commenced this action in a Colorado state court. The case was removed to the United States District Court for the District of Colorado on the basis of the diversity of citizenship between the parties.

Petitioner's amended complaint asserted claims for breach of an employment contract, quantum meruit, misrepresentation and outrageous conduct. (Joint Appendix ("J.A."), p. 5) The district court granted summary judgment in favor of respondent on the claims for breach of contract and outrageous conduct. (Petition for Writ of Certiorari ("Petition"), pp. 23-29) The remaining claims were tried before a jury in March, 1984. The jury found for respondent on the misrepresentation and implied contract claims, and awarded petitioner $5,000 on his quantum meruit claim, based on a post-termination supplemental purchase order. (Petition, p. 33) Petitioner did not raise a claim for attorneys' fees in the complaint or in any other

pleadings, and he presented no evidence at trial with respect to attorneys' fees.

The district court entered judgment on the verdict on March 26, 1984. (Petition, p. 31) The judgment awarded petitioner $5,000 and dismissed petitioner's remaining claims. On March 30, 1984, petitioner filed a bill of costs raising for the first time a claim for attorneys' fees under Colorado Revised Statutes ("C.R.S.") § 8-4-114, the Colorado Wage Claim Act. On April 2, 1984, petitioner filed a motion to amend the judgment pursuant to Fed.R.Civ.P. 59 and 60, in which he challenged various of the court's rulings at trial. (J.A., p. 24) That same day, petitioner filed a separate motion for attorneys' fees, requesting that fees be awarded "as part of the costs of this action" pursuant to the Colorado statute. (J.A., p. 29)

On May 14, 1984, the district court denied petitioner's original and amended motion to amend the judgment, and granted petitioner's motion for attorneys' fees, directing petitioner to file supporting documents in the event the parties were unable to agree upon the amount of a reasonable attorneys' fee. (Petition, pp. 33-45)

On July 3, 1984, the court entered an order awarding petitioner attorneys' fees in the amount of $1,000, "to be taxed as costs." (Petition, p. 48) Petitioner thereafter filed a motion for relief from the July 3, 1984 order (J. A., p. 46) which motion was denied on August 1, 1984. (Petition, pp. 53-54)

Petitioner filed his only notice of appeal on August 29, 1984, more than three months after the district court denied petitioner's Rule 59 motion. (J.A., p. 51) Respondent moved for summary dismissal of the appeal on the

ground that the thirty-day period to file the notice of appeal commenced on May 14, 1984, the date the district court disposed of the motion to amend the judgment. On December 12, 1986, the Court of Appeals for the Tenth Circuit granted respondent's motion for summary dismissal. An order of dismissal was entered as to all issues except the district court's determination of the amount of attorneys' fees, which was affirmed. (Petition, pp. 14-20) Petitioner filed a petition for rehearing, which was denied on March 26, 1987. (Petition, p. 22) This Court granted the Petition for Writ of Certiorari on October 13, 1987.

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SUMMARY OF ARGUMENT

1. The court of appeals correctly ruled that the timeliness of petitioner's appeal is a matter of federal procedure that is controlled by federal law. Petitioner's reliance on *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) overlooks the applicable federal rules and ignores the distinction between substance and procedure.

a. The federal rules of civil procedure and appellate procedure govern the finality of judgments and the timeliness of federal appeals. Fed. R. Civ. P. 58 reflects the policy that the entry of a judgment should not be delayed pending the award of costs to the prevailing party. The history of this provision suggests that the reference to costs was meant to encompass attorneys' fee awards where the relevant authority provides for such awards. *See Marek v. Chesny*, 473 U.S. 1, 8 (1985). Since the issue raised

by petitioner requires the interpretation and application of Fed. R. Civ. P. 58 and Fed. R. App. P. 4(a), there is no room for operation of a different set of state procedures intended to govern the finality and appealability of state court judgments. *See Burlington Northern R. Co. v. Woods*, 107 S. Ct. 967 (1987); *Hanna v. Plumer*, 380 U.S. 460 (1965).

b. The effect of a pending motion for attorneys' fees on the timeliness of a notice of appeal presents an issue of federal procedure, even if the issue were not controlled by the federal rules of procedure. Determining the timeliness of appeals in diversity cases in accordance with a consistent federal procedure will not encourage forum shopping, nor will it result in discrimination against residents of the forum state. There is nothing in *Erie* to suggest that in a diversity action either party should be entitled to follow the time limits for appeals in the state courts.

2. Under federal law, petitioner was required to file his notice of appeal within thirty days after the date on which the district court denied his Rule 59 motion to amend the judgment. Fed. R. App. P. 4(a)(1) and (4). This time period was not stayed by the pendency of his request for an award of attorneys' fees.

a. The history and purpose of Fed. R. Civ. P. 58 indicate that an attorneys' fee award, where authorized under applicable law, should be regarded as an item of costs, and therefore separate from the judgment on the merits. At the time the "cost" provision was added to Rule 58, the drafters were aware that the definition of "costs" would, in many cases, encompass attorneys' fees.

Marek v. Chesney. The principle embodied in Rule 58, that entry of judgments should not be delayed for the taxing of costs, is particularly important in the case of a request for fees, which necessarily must await the decision on the merits and which can require lengthy post-judgment proceedings.

b. This Court's decision in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982) confirms that attorneys' fee awards, by their very nature, are collateral to the judgment on the merits. Since a request for fees does not constitute a Rule 59 motion to amend, the pendency of such a request cannot stay the time period for appeal under Fed. R. App. P. 4(a)(4). On the contrary, the time for appeal runs from the date of entry of the judgment on the merits or denial of the motions referred to in Fed. R. App. P. 4(a)(4). Consistent application of this rule in both federal question and diversity cases will promote finality, fairness and judicial economy.

c. A majority of the courts of appeals have followed the logic of *White* and adopted a bright-line rule to the effect that attorneys' fee awards are always collateral to the judgment on the merits and, thus, do not toll the period for appealing from the judgment. A minority of courts have adopted an *ad hoc* or situational approach, deciding in each case whether the particular fee request is collateral or integral to the judgment based on the application of several criteria. This approach produces uncertainty and increases the risk that litigants will unwittingly forfeit their right of appeal. It should not be adopted.

3. Under either the bright-line rule or the *ad hoc* approach, the fee award in this case plainly was collateral to the judgment on the merits. The Colorado statute involved here directs that the fees be awarded to the winning party "as part of the costs of the action." C.R.S. § 8-4-114. Petitioner did not request attorneys' fees in his complaint, did not present his request at trial, and first raised the issue in his bill of costs. Even under the *ad hoc* approach, these circumstances lead to the conclusion that the award of fees to petitioner was collateral.

4. If the timeliness of petitioner's appeal were measured according to state law, and not as a matter of federal procedure, there is still no basis to conclude that the fee award was integral to the judgment. As noted, the statute itself defines the fees as an item of "costs." No Colorado case holds otherwise. Moreover, petitioner's characterization of the fee award as integral to the judgment arose only after his appeal was deemed untimely and is inconsistent with his prior position.

5. There is no merit to petitioner's argument that the treatment of fee awards as collateral to the judgment should be given prospective application. Under *Firestone Tire and Rubber Company v. Risjord*, 449 U.S. 368 (1981), a jurisdictional ruling should not be made prospective only. Moreover, the conditions that must exist for prospective application of a ruling are completely absent from this case. The Tenth Circuit's decision in *Cox v. Flood*, 683 F. 2d 330 (10th Cir. 1982), is a clear and unequivocal statement of the rule which predated the entry of final judgment in this matter by almost two years. That decision clearly foreshadowed the result in this case. Peti-

tioner cannot have relied upon any federal or state decision in failing to file a timely notice of appeal, and no unfairness results to petitioner from application of the rule in *Cox* to his case.

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ARGUMENT

I. THE TIMELINESS OF PETITIONER'S APPEAL IS GOVERNED BY FEDERAL LAW.

The court of appeals correctly dismissed petitioner's appeal on the ground that petitioner failed to meet the thirty-day filing deadline prescribed by Rule 4 of the Federal Rules of Appellate Procedure. (Petition, p. 19) The proper application of Rule 4 is a matter of procedure that unquestionably is controlled by federal law.

Petitioner's invocation of the *Erie* doctrine confuses substantive rights with the process by which those rights are enforced. Petitioner's entitlement to an award of attorneys' fees is a substantive right created by state law, in this case the Colorado Wage Claim Act. No one here questions petitioner's substantive right to attorneys' fees under the Colorado statute,[2] and, indeed, the Court of Appeals expressly affirmed the district court's award of attorneys' fees. But to suggest that Colorado law likewise governs the timeliness of petitioner's notice of appeal is

[2]*See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259, n.31 (1975).

to deny any distinction between substantive rights and procedural rules.

As demonstrated below, the drafters of the federal rules of procedure recognized the need to establish uniform federal rules with respect to the finality of judgments and the timeliness of appeals. These rules were designed to displace conflicting state law and to ensure consistent practice and procedure in the federal courts, in federal question and diversity actions alike.

Even if the issue raised by petitioner were not covered by the federal rules, its proper resolution remains a matter of federal procedure. Applying a consistent federal procedure to the treatment of attorneys' fees in diversity actions will not influence a plaintiff's choice of forum, nor will failure to apply state procedure discriminate against citizens of the forum state. Thus, application of federal law in this case does not run afoul of *Erie*.

A. The Federal Rules of Procedure Control the Timing and Manner of Federal Appeals.

Petitioner contends that, under Colorado law, a judgment is not final and appealable until determination of the amount of an attorneys' fee award. As discussed below, respondent does not accept this characterization of the Colorado law. Nevertheless, even if petitioner were right, the Colorado rule would have no application in a federal diversity action, because the federal rules of procedure govern the timing and manner of all appeals to the United States courts of appeals. Fed.R.Civ.P. 1; Fed.R.App.P. 1.

The right of appeal itself derives from a federal statute, 28 U.S.C. § 1291. That statute confers upon the courts

of appeals jurisdiction of appeals "from all final decisions of the district courts of the United States. . . ." The timing of such appeals is prescribed in the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure. Under Fed.R.App.P. 4(a)(1), a notice of appeal must be filed "within 30 days after the date of entry of the judgment or order appealed from. . . ." Entry of a judgment is defined in Fed.R.App.P. 4(a)(6) by reference to Fed.R.Civ.P. 58 and 79(a). These rules require that every judgment be set forth on a separate paper and that the clerk formally enter the judgment on the docket, showing the substance of the judgment and the date of its entry.

The federal rules also address the relationship between the entry of judgment and an order for costs. Rule 54(d) describes the allowance of costs generally, and Rule 58 states that "[e]ntry of the judgment shall not be delayed for the taxing of costs." The purposes underlying this latter provision demonstrate the intent of the drafters of the federal rules to occupy the field and displace any other district court or state court rules dealing with the finality and appealability of judgments.

The provision with respect to costs did not appear in the original version of Rule 58, and was added by amendment in 1946 to ensure the application of a uniform federal rule. The Advisory Committee Report indicates that the amendment was aimed at conflicting district court and state court rules regarding the taxation of costs. Citing *United States v. Nordbye*, 75 F.2d 744 (8th Cir. 1935), *cert. denied* 296 U.S. 572 (1935), the Advisory Committee emphasized that Rule 58 would apply "even though state law is to the contrary." Advisory Committee Report on the

Federal Rules of Civil Procedure, 5 F.R.D. 433, 475-76 (1946). In *Nordbye*, the petitioner had argued that under Minnesota state law, the time for appeal did not commence to run until an award of costs was inserted in the judgment. The Court of Appeals rejected the argument, stating that

> the finality of a judgment for purposes of appeal in federal courts is not controlled by the procedure in the state courts, but is governed by the statutes of the United States and the procedure, rules and decisions of the national courts.

Id. at 746.

The *Nordbye* court did not indicate whether the "costs" awarded in that case encompassed an award of attorneys' fees, and this Court has not yet decided whether post-judgment fee requests constitute motions for "costs" under Rules 54(d) and 58. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 455, n.17 (1982). As demonstrated in Part II below, the drafters of the federal rules clearly recognized that the definition of "costs" under a variety of statutes included awards of attorneys' fees, and thus there is good ground to infer that the reference to "costs" in Rule 58 was meant to encompass attorneys' fee awards as well as any other awards of litigation costs. But putting aside that specific question, there can be no doubt that the finality of a judgment and the timeliness of a notice of appeal are matters that the rulemakers intended would be controlled by the federal rules of procedure.

Petitioner's argument that there is no federal rule directly requiring that "attorneys' fees be treated as a

collateral issue" (Petitioner's Brief, p. 11) misses the point of this Court's recent decision in *Burlington Northern R. Co. v. Woods*, 107 S.Ct. 967 (1987). The Court there recognized that in some cases the federal rules "implicitly" control the issue, and therefore must be read to displace the relevant state rule. In *Burlington Northern*, an Alabama statute imposed a mandatory 10% affirmance penalty. The statute did not, by its terms, directly conflict with Fed.R.App.P. 38. Nevertheless, this Court held that the purposes underlying Rule 38 "are sufficiently co-extensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity actions." 107 S.Ct. at 971.

In the present case, the federal rules address the finality of judgments and regulate the timing of appeals. Issues arising with respect to the timeliness of an appeal involve the interpretation and application of the federal rules. There is no room for the operation of a different set of state rules regarding the timeliness of appeals. *Burlington Northern*, 107 S.Ct. at 969; *see Hanna v. Plumer*, 380 U.S. 460, 471-73 (1965).

Finally, there can be no argument that application of the federal rules in this case would transgress constitutional or statutory constraints on this Court's rulemaking authority. Rules regulating the timing of appeals fall into the category of rules that are "indisputably procedural and *a priori* constitutional." *Burlington Northern*, 107 S.Ct. at 970. Similarly, such rules do not "abridge, enlarge or modify any substantive right" within the meaning of the Rules Enabling Act, 28 U.S.C. § 2072. Even if

such rules "incidentally affect litigants' substantive rights," they are exactly the sort of housekeeping rules that are necessary to maintain the integrity of the federal judicial system. *Burlington Northern*, 107 S.Ct. at 970; *see Hanna v. Plumer*, 380 U.S. at 464-65, 473; *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445-446 (1946). In short, applying the federal rules to determine the timeliness of petitioner's appeal "affects only the process of enforcing [petitioner's] rights and not the rights themselves." *Burlington Northern*, 107 S.Ct. at 971; *see* Ely, The Irrepressible Myth of Erie, 87 *Harv.L.Rev.* 693, 722 (1974).

B. Even in the Absence of Controlling Federal Rules, the Timeliness of Petitioner's Appeal Is Properly Determined as a Matter of Federal Procedure.

If the Court were to conclude that the federal rules neither explicitly nor implicitly control the relationship between attorneys' fee awards and the finality of a judgment, it does not follow that state law must govern. Indeed, the policies behind this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) lead to exactly the opposite conclusion.

In the absence of federal rules covering the matter, the issue would shift from a Rules Enabling Act analysis to application of the more general principle that federal courts in diversity actions should apply state substantive law and federal procedural law. *Hanna*, 380 U.S. at 465-69; *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-52 (1980). Petitioner has not offered any rationale for concluding that the timeliness of his appeal should be viewed as anything other than federal procedural law.

This Court has emphasized that the choice between applying a state rule or a federal rule in a diversity action must be made with reference to the "twin aims" of *Erie*: "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna,* 380 U.S. at 468; *Walker,* 446 U.S. at 746. Neither of these objectives requires the application of state law to determine the timeliness of petitioner's appeal.

It could not reasonably be claimed that applying a federal rule with respect to the treatment of attorneys' fee awards in diversity actions will encourage forum shopping. As long as a litigant knows what the correct procedure is in both the state forum and the federal forum, the opportunity to prosecute an appeal will be the same in either court.

The fact that application of a federal rule in this case, at this point in the litigation, may be "outcome determinative" with regard to petitioner's appeal does not mean that the federal rule is outcome determinative in the *Erie* sense. As this Court noted in *Hanna*, the risk of forum shopping must be measured as of the outset of the litigation; otherwise *every* procedural variation—even differing time limits for the filing of pleadings—could be viewed as outcome determinative. Rejecting that approach, the Court stressed that a plaintiff who finds himself in federal court in a diversity action "cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts." *Hanna,* 380 U.S. at 468-69.

The same logic dictates the result in this case. The case having been removed to federal court, petitioner can-

not expect to file his notice of appeal in accord with the time limits applicable to appeals within the state court system. As in *Hanna*, "though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of forum." *Id.* at 469. Moreover, because the application of a federal rule does not deprive residents of the forum state of the opportunity to appeal from an adverse judgment, the equal protection concerns raised in *Erie* have no bearing in this case.

Practical considerations underscore the appropriateness of a uniform federal rule with respect to the finality of judgments and the timeliness of appeals in diversity actions. Application of a consistent rule throughout the federal judicial system ensures predictability, and protects litigants from the uncertainties inherent in attempting to apply a hodgepodge of inconsistent and potentially ambiguous state rules. In this case, for example, the parties do not agree on what the Colorado rule is. The statute itself states that attorneys' fees are "to be taxed as part of the costs of the action," C.R.S. § 8-4-114, yet petitioner relies on state court decisions involving other statutes to argue exactly the opposite. Given the potential forfeiture resulting from a failure to follow the correct procedure, litigants are entitled to expect the application of a clearly defined and uniform rule.

Applying state court procedure to the treatment of attorneys' fees would produce even greater confusion in cases that combine federal and state causes of action. For example, a plaintiff in federal court might assert, in sepa-

rate counts, violation of both federal and state antitrust laws. Both federal and state law may specify a statutory right to attorneys' fees. If federal procedure treats attorneys' fees as costs, and the forum state's procedure treats attorneys' fees as an integral part of the judgment, a losing defendant may be faced with two different timetables for appeal, depending on whether the jury's verdict appears to be based on the federal claim or the state claim.[3] There is nothing in *Erie* to suggest that the federal courts must tolerate such a procedural nightmare.

Finally, there is no identifiable state interest in dictating how federal courts determine the timeliness of appeals. Issues relating to the finality of judgments and the deadlines for filing notices of appeal are matters of judicial administration and convenience. The resolution of these issues in the federal court should rest entirely on the application of federal law.

II. UNDER FEDERAL LAW, A MOTION FOR ATTORNEYS' FEES DOES NOT STAY THE TIME FOR APPEALING A FINAL JUDGMENT.

As a matter of federal procedure, petitioner's motion for attorneys' fees did not stay the time period specified in Fed.R.App.P. 4(a) for filing a notice of appeal. First,

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[3]*See, e.g., Bilmar Drilling, Inc. v. IFG Leasing Co.*, 795 F.2d 1194, 1202 (5th Cir. 1986) (defendant sought attorneys' fee award pursuant to contract and based on 28 U.S.C. § 2202; in determining timeliness of appeal, court of appeals applied state law to decide that award of fees pursuant to contract was an integral part of the judgment, and applied federal law to decide that award of fees pursuant to 28 U.S.C. § 2202 was collateral to the judgment).

Fed.R.Civ.P. 58 directs that entry of final judgment on the merits not be delayed for determination of the costs incurred by the prevailing party. The history of Rule 58 strongly suggests that this policy applies to allowable attorneys' fees just as it does to other expenses of litigation permitted under applicable law. Second, and in any event, this Court's decision in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), confirms that attorneys' fee awards are collateral to the decision on the merits. It follows logically that the time period for appealing a judgment on the merits should not be stayed pending consideration of a request for attorneys' fees.

A. The History and Purpose of the Federal Rules Demonstrate That an Award of Attorneys' Fees Should Be Treated as an Item of Costs.

Rule 58 of the Federal Rules of Civil Procedure expresses a clear federal policy that final judgment should be entered promptly after a decision on the merits, without awaiting the award of costs to the prevailing party. Advisory Committee Report, 5 F.R.D. 433, 475 (1946); *see* Wright & Miller, *Federal Practice and Procedure* § 2785 at 18 (1973).

This policy has several important implications. For a prevailing plaintiff, entry of the judgment makes possible the issuance of a writ of execution, Fed.R.Civ.P. 69, and starts the clock running on post-judgment interest, 28 U.S.C. § 1961. For the losing party, whether plaintiff or defendant, entry of the judgment triggers the right of appeal. Because the federal rules do not specify any time limit on taxation of costs, the mandate in Rule 58 assures

that enforcement of decisions on the merits will not be delayed by disputes over the proper measure of costs.

Rule 58 also reflects a practical distinction between a judgment on the merits and an award of costs. Of necessity, costs cannot be determined until a final decision on the merits, since only then can the "prevailing party" be identified. Fed.R.Civ.P. 54(d); *cf. White,* 455 U.S. at 451-52. Further, since costs may accrue at any stage of the litigation, any calculation attempted prior to the entry of final judgment is bound to be incomplete. In effect, Rule 58 recognizes that the determination of costs is an entirely separate legal action from an adjudication on the merits. *See Maryland Cas. Co. v. Jacobsen,* 37 F.R.D. 427, 430 (W.D. Mo. 1965); *cf. White,* 455 U.S. at 452.

In *White,* this Court found it unnecessary to reach the question whether the reference to "costs" in Rule 58 was meant to encompass awards of attorneys' fees. The history of the federal rules, and the policy reflected in Rule 58, suggest that Rule 58 should be so construed, ensuring that the entry of a final judgment will not be delayed by consideration of an attorneys' fee request.

When Rule 58 was amended in 1946 to include the reference to costs, the authors of the amendment were aware of a variety of "statutes as to costs" authorizing the award of attorneys' fees as part of the costs in particular cases. Advisory Committee's Note to Rule 54(d), 28 U.S.C. App., p. 621; *Marek v. Chesny,* 473 U.S. 1, 8 (1985). Thus, in directing that the entry of judgment not be delayed for the taxing of "costs," the drafters recog-

nized that the definition of taxable costs would vary from case to case; the principle embodied in the amendment obviously does not turn on the specific items of costs allowable in a given case. In short, it is reasonable to infer that the term "costs" in Rule 58 was meant to encompass all costs, including attorneys' fees, that might be awarded under the applicable statute, rule or other authority. *See Marek v. Chesny,* 473 U.S. at 9.

The practical considerations that underlie Rule 58 apply with particular force to attorneys' fee awards. Typically, a fee award must await the determination of a "prevailing party." Since attorneys' fees are continuously accruing in the course of the litigation, the amount of the award cannot be fixed until the final judgment has been entered. In addition, the inquiry involved in determining a reasonable fee is such that further proceedings and lengthy delay are common. This process often requires the submission of detailed hourly time reports dating back to the beginning of the case, and frequently results in extensive briefing and argument. Delaying the entry of judgment until the conclusion of this process would defeat the very objectives embodied in the 1946 amendment to Rule 58.

In applying Rule 58, it should make no difference whether the attorneys' fee award is predicated on a federal statute, a state statute, or some other authority. In this case, petitioner's motion for attorneys' fees was predicated on a Colorado statute that specifically directs the award of "a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of this action." C.R.S. § 8-4-114. The timing and character of the court's

inquiry under this statute is no different than that required by federal statutes authorizing the award of attorneys' fees. *See White*, 455 U.S. at 451-452; *Marek*, 473 U.S. at 9. What matters is that the determination of a reasonable attorneys' fee is separate from, and necessarily must await, the decision on the merits. *See Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286, 293 (7th Cir. 1985).

In this case, the district court properly entered final judgment on March 26, 1984, without awaiting petitioner's filing of his bill of costs (in which, for the first time, he requested attorneys' fees). Under Fed.R.App.P. 4(a)(1) and (4), petitioner's thirty-day period for filing a notice of appeal commenced on May 14, 1984, when the court denied petitioner's motion to amend the judgment. By failing to file his notice of appeal until August 29, 1984, petitioner waived his right of appeal.

B. Under White v. New Hampshire Dept. of Employment Security, an Award of Attorneys' Fees Is Collateral to the Judgment on the Merits.

Whether or not attorneys' fees are properly viewed as "costs" under Rule 58, a fee award is clearly collateral to the judgment on the merits. Accordingly, as a matter of federal procedure, the judgment for petitioner was final and appealable prior to entry of the fee award.

This conclusion follows naturally from the Court's decision in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982). In *White*, the Court considered a post-judgment request for attorneys' fees under

the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988. In holding that Fed.R.Civ.P. 59(e) does not apply to such requests, the Court stressed the collateral nature of the fee request, which requires "an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.'" 455 U.S. at 451-52. The same considerations apply to petitioner's fee request in this case.

Although the issue in *White* was limited to the applicability of Rule 59(e), the Court's reasoning anticipated the result in this case. The Court expressly noted, in support of its decision, several circuit court cases holding that a decision on the merits is final and appealable prior to the entry of a fee award. *Id.* at 452, n.14; *see e.g., Obin v. District No. 9, Int'l Assn. of Machinists and Aerospace Workers*, 651 F.2d 574, 584 (8th Cir. 1981).[4] The Court stated, "the collateral character of the fee issue establishes that an outstanding fee question does not bar

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[4]In *Obin*, the court of appeals decided that attorneys' fee requests do not constitute applications for costs under Rules 54(d) and 58. This conclusion did not lead the court to characterize fee awards as integral to the judgment on the merits. On the contrary, the court emphasized that fee awards differ from judgments on the merits, both in terms of the nature of the proceeding and the effect of the award. 651 F.2d at 580-581. On that basis, the court ruled:

> When a final judgment on the merits has been entered in an action in which a claim for attorneys' fees remains pending, the time for appeal on the merits runs from the entry of judgment. Subsequent consideration by the district court of the attorneys' fee claim does not toll the time for appealing the judgment on the merits.

Id. at 584.

recognition of a merits judgment as 'final' and 'appealable' ". 455 U.S. at 452, n.14 (citing *Obin*).

Logically, the holding in *White* forecloses any argument that a motion for attorneys' fees stays the thirty-day period for appeal from a judgment on the merits. Under Fed.R.App.P.4(a)(4), *only* if the request for fees were viewed as a Rule 59 motion would the time for appeal be extended. Since *White* holds that Rule 59 does not apply to post-judgment fee requests, the exception to Fed.R. App.P. 4(a)(1) is not available.

Nothing in the *White* opinion suggests that post-judgment motions for attorneys' fees based on authority other than the Civil Rights Attorneys' Fees Awards Act should be treated any differently. A rule that treats all attorneys' fee awards as collateral to the judgment on the merits is the only rule with respect to appellate review that promotes finality, judicial economy and fairness.

Since 1982, the principle adopted in *White* has been applied to a wide range of attorneys' fee requests. Following the rationale of *White*, the overwhelming majority of circuit courts have determined, without qualification, that a request for attorneys' fees is collateral to the merits and should be separately reviewed.[5]

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[5]For examples of the "bright-line" approach see: *Schultz v. Crowley*, 802 F.2d 498 (D.C. Cir. 1986); *Crossman v. Maccoccio*, 792 F.2d 1 (1st Cir. 1986); *Ellender v. Schweiker*, 781 F.2d 314 (2d Cir. 1986); *Abrams v. Interco, Inc.*, 719 F.2d 23 (2d Cir. 1986); *Bernstein v. Menard*, 728 F.2d 252 (4th Cir. 1984); *Morgan v. Union Metal Manufacturing*, 757 F.2d 792 (6th Cir. 1985); *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286 (7th Cir. 1985); *International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local Union 75 v. Madison Industries, Inc.*, 733 F.2d 656 (9th Cir. 1984); *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982).

A minority of circuits have deviated from the Court's reasoning in *White*. The *ad hoc* or situational approach adopted by those circuits requires an independent analysis of every attorneys' fee request to determine whether the request is collateral or integral based upon the wording of the statute or contract and other factors.[6] Even the leading proponent of the *ad hoc* approach, the Fifth Circuit, acknowledges the difficulties its case-by-case analysis creates for litigants. *See e.g., Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165, n.4 (5th Cir. 1984). If, in every instance, a litigant is forced to analyze whether his attorneys' fee request is integral or collateral, uncertainty rules. Unnecessary litigation will be engendered over the nature and application of state law, and its impact upon finality of the judgment.[7] In contrast, if the rule in *White* is applied consistently and attorneys' fee

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[6]See *Halderman v. Pennhurst State School and Hospital*, 673 F.2d 628 (3d Cir. 1982) *cert. denied* 465 U.S. 1038 (1984); *Beckwith Machinery Co. v. Traveler's Indemnity Co.*, 815 F.2d 286 (3d Cir. 1987); *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143 (5th Cir. 1982), *cert. denied* 459 U.S. 1109 (1983); *Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984); *Certain British Underwriters at Lloyds of London, England v. Jet Charter Service, Inc.*, 739 F.2d 534 (11th Cir. 1984).

[7]A careful review of those cases adopting the *ad hoc* approach demonstrates the uncertainty that a lawyer faces in attempting to define the intricacies of the relationship between attorneys' fees and damages. *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286, 294 (7th Cir. 1985), rejected the *ad hoc* approach as "too metaphysical" and held that resolution of the question of that relationship would depend on the legislative or bargaining history of a given statute or contract, a determination that most probably would *never* have a sensible answer. The *Exchange* court's analysis was adopted by the Tenth Circuit in its opinion in the instant case.

requests are deemed collateral to a judgment on the merits, litigants and their attorneys can approach post-judgment and appellate considerations with confidence, knowing that in diversity cases, while state law will determine the entitlement to fees, they may apply definitive, unambiguous rules of the federal courts to the timing of federal appeals.

Separation of a fee award from the merits judgment is the practical appproach. Designated as costs or otherwise, contractual or statutory, fee entitlements traditionally depend upon the court's determination of the prevailing party. Because of their dependent nature, attorneys' fees cannot be determined until litigation is complete and judgment has been entered. The standards for determining the reasonableness of fees require the trier of fact to review the litigation process from beginning to end. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In many instances, the prevailing party cannot be finally determined until the completion of appellate proceedings and, since the winning party is entitled to an award of fees for the appeal, the award cannot be quantified until the exhaustion of an appeal.[8] Judicial economy is not promoted by delaying an appeal of the merits pending a decision on attorneys' fees, only to find the attorneys' fee issue must be retried to reflect a reversal or other change in the decision on the merits. The need for finality, judicial economy and

[8]See e.g. *Keeton v. Rike*, 559 P.2d 262 (Colo. App. 1971) (under Colorado Wage Claim Act, C.R.S. § 8-4-114, the "winning party" may be entitled to fees for a successful appeal).

clarity can be best addressed by a rule under which all attorneys' fee requests are deemed collateral and are addressed and appealed separately from any determination on the merits. As was suggested in *White*, the district courts can adopt local rules which enable them either to reserve a decision on attorneys' fees until after an appellate decision or promptly to hear and determine claims for attorneys' fees, allowing the appellate courts to consider fee awards together with any appeal from a final judgment on the merits.[9]

III. THE ATTORNEYS' FEE AWARD IN THIS CASE IS COLLATERAL TO THE JUDGMENT UNDER ANY APPROACH ADOPTED BY THE FEDERAL COURTS.

Whether this Court follows the bright-line approach or the *ad hoc* approach, petitioner's motion for attorneys' fees is collateral to the judgment. As a result, petitioner's attorneys' fee motion would not, in any event, have stayed the thirty-day period for appeal from a judgment on the merits.

Petitioner may contend that, under the *ad hoc* approach, the time for appealing the merits should be stayed pending an attorneys' fee decision when state law views the attorneys' fee award as integral to the judgment. While the minority approach does look to the underlying state law as the source of entitlement to attorneys' fees, it does so only as a preliminary step to the application of federal criteria to determine whether the fee award is collateral or integral.

[9]See *White*, 455 U.S. at 454.

The factors utilized by the courts applying the *ad hoc* approach include whether such fees are contractual or statutory, whether they are denominated as costs or otherwise, whether their entitlement depends upon a party prevailing in the litigation, and whether the issue of fees was included in the relief requested in the complaint.[10] In applying these criteria, both the Fifth and the Eleventh Circuits have looked to state law in diversity actions as the source of the fee award, but have utilized federal law to determine whether the attorneys' fee award should be treated as "collateral" or as "costs" or as an "integral part of the merits." *See Certain British Underwriters at Lloyds of London, England v. Jet Charter Service, Inc.*, 739 F.2d 534, 535 (11th Cir. 1984) and *Oxford Production Credit Assoc. v. Duckworth*, 689 F.2d 587, 589 (5th Cir. 1982).

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[10]Attorneys' fee awards based on express contract provisions have been distinguished from statutory fee awards by the Second Circuit in *F.H. Krear & Co. v. Nineteen Named Trustees*, 776 F.2d 1563 (2d Cir. 1985). The Fifth Circuit, in *Oxford Production Credit Assoc. v. Duckworth*, 689 F.2d 587 (5th Cir. 1982), determined that, under Mississippi law, awards of contractual attorneys' fees were treated as part of the damages. *See also Hooper v. FDIC*, 785 F.2d 1228 (5th Cir. 1986) and Bilmar Drilling, Inc. v. IFG Leasing Co., 795 F.2d 1194 (5th Cir. 1986).

In *Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984), the Fifth Circuit, following *Holmes v. J. Ray McDermott & Co., Inc.*, 682 F.2d 1143 (5th Cir. 1982), found that attorneys' fees denominated as "costs" were clearly collateral to the judgment. The Fifth Circuit viewed the fee request in *Alcorn County* as an integral item of the damages because the request for attorneys' fees was included in the complaint and was an integral issue in the trial, determined by the trier of fact at the time that the substantive issues were determined. In the instant case, attorneys' fees were first requested post-judgment, in petitioner's bill of costs, and formed no part of his pre-judgment requests for relief.

For example, in *Certain British Underwriters*, the Eleventh Circuit reviewed a Florida statute providing for attorneys' fees. That statute provided that compensation for attorneys' fees would be included in the judgment or decree rendered in the case. In contrast to the Colorado statute, attorneys' fees were not designated as costs. The Eleventh Circuit specifically recognized that other categories of attorneys' fees were collateral, including those where the applicable statute designates attorneys' fees as costs. 739 F.2d at 535.

The Colorado courts have never addressed the precise nature of the attorneys' fee authorized in C.R.S. § 8-4-114, the Colorado Wage Claim Act. Utilizing the criteria developed by those federal courts which have adopted the *ad hoc* approach, it is clear that a fee award under the Colorado Wage Claim Act is collateral even under that approach.

Under the Act, the entitlement to attorneys' fees is provided in an entirely separate statutory provision from that which sets forth the damages which may be awarded to the successful employee. *Compare* C.R.S. § 8-4-104 and § 8-4-114. The fee statute clearly does not contemplate attorneys' fees as damages. The award of fees is mandatory and applies to *either* plaintiff or defendant, whichever is successful. *Hartman v. Freedman*, 591 P.2d 1318 (Colo. 1979); *Hofer v. Polly Little Realtors, Inc.*, 543 P.2d 114 (Colo. App. 1975). The fees are described as "costs" and directed to be taxed as such. Nowhere can petitioner find support for his contention that attorneys' fees are part of his damages.

Further, in the instant action, the fee issue was never raised prior to submission of petitioner's bill of costs following entry of the judgment. The criteria which would support treating fees as integral to the merits judgment are not present here.

Regardless of whether the attorneys' fees entitlement embodied in C.R.S. § 8-4-114 is analyzed under the bright-line approach or the *ad hoc* approach, all circuit courts would find it collateral to the judgment on the merits. Accordingly, when petitioner failed to pursue his right to an appeal of the judgment on the merits in a timely fashion, that right was foreclosed.

IV. UNDER COLORADO LAW, AN AWARD OF ATTORNEYS' FEES PURSUANT TO THE COLORADO WAGE CLAIM ACT IS AN AWARD OF COSTS AND COLLATERAL TO THE JUDGMENT.

For the reasons discussed in Part I, the timeliness of petitioner's appeal must be determined as a matter of federal law. The court of appeals was not required to apply the timetable adopted by Colorado courts with regard to state appeals. However, even if this Court were to conclude that Colorado law must be applied, petitioner's appeal was still untimely.

As noted above, the Colorado Wage Claim Act provides that an award of fees is "to be taxed as part of the costs of the action." While the record indicates that petitioner has treated his attorneys' fee request as costs throughout the proceeding below, he now seeks to reformulate his request as an integral part of the merits.

He then argues that, under Colorado law, a judgment is not final while a request for attorneys' fees is pending. The cases cited by petitioner do not support his argument.

The Colorado courts have never addressed the nature of attorneys' fees under C.R.S. § 8-4-114. *Ball Corporation v. Loran,* 596 P.2d 412 (Colo. App. 1979) was a case which involved attorneys' fees sought as part of the damages in a Lanham Act case. That Act provides for attorneys' fees as part of the damages. *See* 15 U.S.C. § 117. The *Ball* court never addressed the questions presented herein. *Ball* simply cited *Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976) in holding that, where liability had been determined but the issue of *damages* had been reserved by the court for future consideration, the court's ruling was not appealable under Colo.R.Civ.P. 54(b) because the order was interlocutory. That holding is not inconsistent with the approach respondent urges here.

In *Ortega v. The Board of County Commissioners of County of Costilla,* 657 P.2d 989 (Colo. App. 1982), attorneys' fees were sought under the provisions of C.R.S. § 13-17-101 *et seq.,* the Colorado statute penalizing frivolous and groundless litigation. Although the *Ortega* court's opinion does not contain any discussion of that statute, it provides that the court may award "as part of its judgment, and in addition to any costs otherwise assessed, reasonable attorneys' fees." Unlike the Colorado Wage Claim Act, there is no specific language directing that fees "be taxed as part of the costs." Under § 13-17-101 *et seq.,* fees are not available to a party merely be-

cause he prevailed, but require a showing that the whole or any part of the action was frivolous, groundless or without substantial justification. In its one paragraph opinion, the *Ortega* court did not touch upon the collateral nature of attorneys' fees. The court only decided that, while the appeal had been fully briefed on the issue of fees, the record did not contain a ruling on defendant's motion for attorneys' fees under C.R.S. § 13-17-101 and the case was not ripe for appeal. Again, nothing in that opinion is inconsistent with respondent's position.

In *Marietta v. Busto*, 691 P.2d 345 (Colo. App. 1984), *cert. denied* 105 S.Ct. 2024 (1985) the nature of the attorneys' fee request is not readily discernible from the opinion, but it is not an opinion interpreting C.R.S. § 8-4-114. The fee request appears to have been made under the Uniform Trade Secrets Act, which has a specific statutory provision, C.R.S. § 7-74-105, that does not define attorneys' fees as costs. The *Marietta* court held that the judgment was not yet final or appealable at a time when the trial court had specifically reserved the issue of recoverability of plaintiff's attorneys' fees but had not yet issued a ruling. The facts in *Marietta* are clearly distinguishable from those here, and the court's ruling does not foreclose a finding that fees denominated as costs are collateral.

Finally, petitioner cites *Torrez v. Day*, 725 P.2d 1184 (Colo. App. 1986). In *Torrez*, the Colorado Court of Appeals held that a post-trial motion for attorneys' fees under C.R.S. § 13-17-101 *et seq.*, the statute penalizing frivolous and groundless litigation, was a motion for alteration or amendment of judgments under Colo.R.Civ.P. 59, and, therefore, extended the time for filing an appeal of the action. As set forth above, C.R.S. § 13-17-101 *et seq.*, and the cases interpreting that statute, are distinguishable from this case.[11]

Petitioner's attempt to apply his current interpretation of Colorado law to the fee award represents a complete about face from his position in the proceedings below. In fact, petitioner consistently interpreted his attorneys' fee request as costs, and treated his fee request as collateral to the judgment on the merits.

Petitioner never mentioned attorneys' fees in the complaint, in the amended complaint, or in any pre-trial motions. The issue was not presented to the jury or the court preceding the entry of judgment on March 26, 1984. Petitioner first requested attorneys' fees in a post-judgment motion, which stated that petitioner was seeking

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[11]The Colorado Court of Appeals recently decided *Basset v. Eagle Telecommunications, Inc. of Colorado*, — P.2d — Case No. 86CA1046 (Colorado Court of Appeals, December 10, 1987). The case addresses the issue of interest on attorneys' fees awarded under C.R.S. § 8-4-114. The court was asked to determine whether attorneys' fees were part of the damages and, if so, whether prejudgment interest on these fees would run from the date of the verdict on damages. The Colorado court held that interest on attorneys' fees runs only from the date an award of fees is entered as a judgment. That opinion contains *dicta* that seems inconsistent and contradictory. The court first states that, because the amount awarded by the jury remains subject to revision until the award of attorneys' fees, no judgment on any amount would be considered to have been entered prior to the fee decision. In the following paragraph, however, the court correctly cites the wage claim statute as providing that the attorneys' fees were to be taxed as part of the costs of the action. The court clearly distinguishes attorneys' fees from the damages in the action. The *Basset* decision cannot be seen as controlling the issue of attorneys' fees as it relates to appellate jurisdiction.

fees as costs. *See* "Memorandum in Support of Attorneys' Fees *as Costs*," filed on April 6, 1984 (J.A., p. 41) (Emphasis added). Although petitioner filed a Rule 59 motion, he did not raise attorneys' fees in that motion and he did not characterize his fee request as altering or amending the judgment.

Petitioner's current characterization of his fees as integral to the judgment is inconsistent with his previous position and pleading in this matter. Petitioner's construction of Colorado law arises solely from his untimely appeal and is not well-founded.

V. APPLICATION OF THE TENTH CIRCUIT'S JURISDICTIONAL RULING TO THIS ACTION DOES NOT VIOLATE ANY RESTRICTIONS ON RETROACTIVITY.

Petitioner argues that the Tenth Circuit's decision is fundamentally unfair, and requests that any decision be given prospective application only. As the Tenth Circuit observed, petitioner's argument is entirely out of place.

Petitioner ignores the fact that the timing of an appeal is a jurisdictional matter. When a court lacks the discretion even to consider the case before it, its ruling may never be made prospective only. *Firestone Tire and Rubber Company v. Risjord,* 449 U.S. 368 at 379 (1981); *Exchange National Bank of Chicago v. Daniels,* 763 F.2d 286, 294 (7th Cir. 1985). In any event, petitioner has not demonstrated circumstances that would warrant limiting the Tenth Circuit's ruling in this case.

Petitioner cites *EEOC v. Gaddis,* 733 F.2d 1373 (10th Cir. 1984) in support of his prospectivity argument. *Gaddis* reiterates this Court's holding in *Chevron v. Huson,* 404 U.S. 97 (1971), outlining three considerations that bear upon the issue of non-retroactivity: (1) whether the holding in question decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases; 2) whether retroactive operation will further or retard the operation of the holding in question; and 3) whether retroactive application could produce substantial and equitable results in individual cases.[12] These standards, applied here, do not indicate that this case warrants an exception to the ordinary rule of retroactivity.

In *Gaddis,* judgment on the merits was entered in March, 1982, only three weeks after this Court's decision in *White.* Subsequent to the decision on the merits, the parties stipulated to entry of an attorneys' fee award. An appeal was then lodged from the entry of a June, 1982 judgment which included the stipulated attorneys' fees.

In July, 1982, the Tenth Circuit, in *Cox v. Flood,* overruled its previous decision in *Glass v. Pfeffer,* 657 F.2d 252 (10th Cir. 1981), and held that "judgments finally disposing of the merits are appealable even though

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[12]*Chevron v. Huson,* 404 U.S. 97, 104 (1971); *EEOC v. Gaddis,* 733 F.2d 1373, 1376 (10th Cir. 1984); *Trinity Broadcasting v. Eller,* — F.2d — No. 86 CA 2118 (10th Cir., December 9, 1987).

questions relating to attorneys' fees have been left undecided." 683 F.2d 330 at 331. In *Cox*, the Tenth Circuit specifically overruled all prior opinions inconsistent with that holding.

Applying the factors enumerated above, the *Gaddis* court declined to apply *Cox* retroactively, finding that Gaddis had acted consistently with the Tenth Circuit's prior holdings, including its decision in *Glass v. Pfeffer*. To do otherwise would have placed the court in the anomalous position of holding that Gaddis' appeal was barred because he did not file an appeal that would have been premature under the law that existed on March 25, 1982, the judgment date.

The court's reasoning in *Gaddis* does not apply here. At the time of the judgment herein, the rule adopted in *Cox* clearly controlled the timing of appeals in the Tenth Circuit. *Cox* was decided almost two years prior to the district court's decision in this case. The resolution of the issue in this case was clearly foreshadowed by *Cox*. Nothing in *Cox* indicated an exception to the rule that judgments are appealable even though questions relating to attorneys' fees, of whatever nature, are undecided. Nothing in *Cox* indicated any acceptance or consideration of an *ad hoc* approach in the Tenth Circuit. *Cox* specifically overruled any prior decisions in conflict with its holding. Petitioner cannot have relied upon federal precedent when he let his appeal period lapse.

Further, as demonstrated above, petitioner cannot realistically claim to have relied on his current interpreta-

tion of Colorado law in failing to appeal the judgment. Having treated attorneys' fees as an item of costs in the proceedings below, petitioner should have taken an appeal without waiting for a resolution of his fees request.

Petitioner's argument that he has a meritorious appeal is not only disputed, but is of no effect. As the record indicates, the merits of petitioner's case are suspect. However, that question is not relevant to a determination of whether application of *Cox* is unfair. The "merits and demerits" discussed in *Gaddis* refer to consideration of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation, and not to the "merits" of this petitioner's case. 733 F.2d 1373 at 1376.

Finally, there is no inequity to petitioner, because the dismissal of his appeal stems solely from his failure to follow the rule articulated by the Tenth Circuit in *Cox v. Flood*. Application of the *Cox* rule to a case decided two years thereafter is scarcely an injustice.

In conclusion, even if this Court could consider petitioner's request for prospective application, none of the criteria justifying prospective application apply here, and petitioner should not be exempted from the jurisdictional rule announced in *Cox*.

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CONCLUSION

For the reasons discussed above, the decision of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

Colorado Revised Statutes, Title 8, Article 4, Section 114
Employee may recover attorney fee. Whenever it is necessary for an employee to commence a civil action for the recovery or collection of wages and penalties due as provided by sections 8-4-104 and 8-4-105, the judgment in such action shall include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action.

Colorado Revised Statutes, Title 8, Article 4, Section 104
Termination of employment—penalty. (3) If an employer refuses to pay wages or compensation in accordance with subsection (1) of this section upon request by the employee and without a good faith legal justification for such refusal, the employer is liable to the employee, in addition to the compensation legally proven to be due, as a penalty for such refusal the greater of an amount equal to fifty percent thereof or an amount equal to the amount of the wages payable per day to such employee not to exceed ten days. The wages payable per day shall be calculated at the same rate which the employee was receiving at the time of separation. The employee or his designated agent shall make a written demand for the payment within sixty days from the date of separation and shall state in the demand where such payment can be received. The daily wage penalty shall not be imposed until the employer receives such written demand. The employee or his designated agent may commence a civil action to recover such penalty. Any employee or his designated agent who has not made a written demand for the payment within sixty days from the date of separation or who has otherwise not been available to receive payment shall not be entitled to any such penalty under this subsection (3). A payment under this subsection (3) shall be made in the form of a check draft or voucher in the name of the employee.

Colorado Revised Statutes, Title 7, Article 74, Section 105
Attorney fees. If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney fees to the prevailing party.

Colorado Revised Statutes, Title 13, Article 17, Section 101
Legislative declaration. The general assembly recognizes that courts of record of this state have become increasingly burdened with litigation which is straining the judicial system and interfering with the effective administration of civil justice. In response to this problem, the general assembly hereby sets forth provisions for the recovery of attorney fees in courts of record when the bringing or defense of an action, or part thereof (including any claim for exemplary damages), is determined to have been substantially frivolous, substantially groundless, or substantially vexatious. All courts shall liberally construe the provisions of this article to effectuate substantial justice and comply with the intent set forth in this section.

Colorado Revised Statutes, Title 13, Article 17, Section 102
Attorney fees. (1) Subject to the provisions of this section, in any civil action of any nature commenced or appealed in any court of record in this state, the court may award, except as this article otherwise provides, as part of its judgment and in addition to any costs otherwise assessed, reasonable attorney fees. (2) Subject to the limitations set forth elsewhere in this article, in any civil action of any nature, commenced or appealed in any court of record in this state, the court shall award, by way of judgment or separate order, reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part, that the court determines lacked substantial justification. (3) When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such

amount, or portion thereof, to any offending attorney or party. (4) The court shall assess attorney fees, if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure or a designation by a defending party under section 13-21-111.5(3) that lacked substantial justification. As used in this article, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious. (5) No attorney fees shall be assessed if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew, or reasonably should have known, that he would not prevail on said claim or action. (6) No party who is appearing without an attorney shall be assessed attorney fees unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any party thereof, was substantially frivolous, substantially groundless, or substantially vexatious; except that this subsection (6) shall not apply to situations in which an attorney licensed to practice law in this state is appearing without an attorney, in which case, he shall be held to the standards established for attorneys elsewhere in this article. (7) No attorney or party shall be assessed attorney fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Colorado. (8) The provisions of this section shall not apply to traffic offenses, matters brought under the provisions of the "Colorado Children's Code", title 19, C.R.S., or related juvenile matters, or matters involving violations of municipal ordinances.